

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

GREGORY DONNELLY,  
Petitioner,

V.

BERNARD BRADY,  
Respondent.

CIVIL ACTION  
No. 04-12706-RWZ

PETITIONER'S REPLICATION TO RESPONDENT'S  
SUPPLEMENTAL BRIEF IN SUPPORT OF  
MOTION TO DISMISS

Petitioner Gregory Donnelly hereby replies to the Respondent Bernard Brady's supplementary brief in support of his motion to dismiss. Since the underlying facts and procedural history of this case have already been extensively set out in the prior submissions of both the Petitioner and the Respondent, an elaborate restatement does not appear necessary. Nevertheless, given the Respondent's position regarding the procedural posture of Petitioner's April 28, 1995, Motion to Correct Sentence (Respondent's Supplementary Brief (RSB), at pgs. 11-12, 17-18); and, the constitutional principles recently announced in Frasch v. Peguese, 414 F.3d 518 (4th Cir. 2005) -- a case strikingly similar to that at bar, a brief rejoinder is required and is set out below.

- I. THE SUPERIOR COURT'S "MARGIN ORDER" COULD NOT HAVE DISPOSED OF ALL OF PETITIONER'S CLAIMS ON MAY 30, 1995, THUS, EFFECTIVELY STAYING THE TIME TO SEEK FEDERAL HABEAS CORPUS REVIEW.

As the Respondent aptly concedes, although "Justice

-2-

Quinlan's December 18, 2002, decision stated that the issues before her had been addressed by the Appeals Court, [ ] the Appeals Court had never addressed the double-jeopardy and duplicity claims raised in the Petitioner's April 28, 1995, Motion to Correct Sentence." (RSB at pg. 17)

Clearly and unequivocally, the margin order relied upon by the Respondent did not, and could not, address the issues raised in Petitioner's Motion to Correct Sentence because the said motion argued separate and distinct claims from those raised in Petitioner's April 13, 1995, letter to Justice Quinlan. Reduced to its essence, Petitioner's April 13, 1995, letter addressed only the breach of the plea agreement -- that is, the failure of the "forthwith" sentencing scheme imposed on the Petitioner to wipe out or extinguish a previously imposed 20 year Concord sentence. (Respondent's Exhibit U)<sup>1</sup> Whereas, Petitioner's April 28, 1995, motion argued duplicitous sentencing and double jeopardy grounds. (Respondent's Exhibit V)

Respondent further asserts that because the Commonwealth opposed both Petitioner's letter to Justice Quinlan and his Motion to Correct Sentence in its May 3, 1995, pleading, the margin order simultaneously disposed of both of Petitioner's pleadings -- that is, the breach of the plea agreement asserted in his April 13, 1995, letter; and, the duplicitous sentencing

---

<sup>1</sup> Although Petitioner's April 13, 1995, letter addressed the identical claim raised in Petitioner's October 16, 2002, motion to correct an illegal sentence, the remedy of "specific performance" to the terms of the plea agreement announced in United States v. Kurkculer, 918 F.2d 295 (1st Cir 1991), was not adopted in Massachusetts until October, 1996, See, e.g., Commonwealth v. Parzyck, 41 Mass.App.Ct. 195, 668 N.E.2d 1358, fur. app. rev. den'd, 423 Mass. 1110 (1996).

-3-

and double jeopardy claims raised in his April 28, 1995, motion. Unfortunately for the Commonwealth, had this actually occurred at the Appeals Court's 1994 review of Justice Quinlan's decision, it would have obviously addressed Petitioner's duplicitous sentencing and double jeopardy claims in its ruling. The cold hard fact is that it did not. See, e.g., Commonwealth v. Donnelly, 37 Mass.App.Ct. 1117, 646 N.E.2d 409 (1994). (Respondent's Exhibit O)

Similarly, the Respondent's reliance on Petitioner's arguments in his affidavit filed in support of his Motion to Strike (RSB pg. 16, referencing Respondent's Exhibit CC, ¶¶ 10 & 13) is also fatally flawed. Plainly, were the Respondent's analysis correct, Petitioner's state writ of habeas corpus filed in the Middlesex Superior Court on April 28, 1995 (Respondent's Exhibit E) would have raised the duplicitous sentencing and double jeopardy claims contained in his Motion to Correct Sentence (Respondent's Exhibit V). Again, it did not. The fact that Petitioner's state habeas action was directed solely to the breach of plea agreement claim addressed in his April 13, 1995, letter to Justice Quinlan demonstrates that Petitioner has always considered his Motion to Correct Sentence, filed April 28, 1995, a separate and distinct action. Moreover, the record supports this analysis because Petitioner's appeal from the denial of his state habeas action addressed only the breach of the plea agreement argument raised in his April 13, 1995, letter. (RSB at pgs. 11-12, Respondent's Exhibit Q)

Frasch v. Peguese, 414 F.3d 518, 522 (4th Cir. 2005; see also Rodriguez v. Spencer, 412 F.3d 29, 33 (1st Cir. 2005); citing Carey v. Saffold, 536 U.S. 214, 223 (2004)).

It is now well settled that a Massachusetts defendant like the Petitioner who pleads guilty is not entitled to an appeal as a matter of right. See Massachusetts General Laws, Chapter 278, § 28; Massachusetts Superior Court Rule 65. Such a defendant may, however, seek direct review of his conviction and sentencing by filing, at any time, a motion for new trial pursuant to Massachusetts Rules of Criminal Procedure 30(b) (emphasis added). See Dunbrack v. Commonwealth, 398 Mass. 502, 498 N.E.2d 1056, 1058 (1986) (the appropriate method for attacking the lawfulness of the admission to sufficient facts and the sentence imposed is a postconviction motion for new trial pursuant to rule 30(b)) (emphasis added). See Reporter's Notes, Mass.R.Crim.P. 30, Subdivision (b), West Pub. (2004 ed.).

While generally Mass.R.Crim.P. 30(b) has been characterized as collateral review, see generally Dunker v. Bissonnette, 154 F.Supp.2d 95 (D.Mass. 2001), here, as in Frasch, it is the nature of the review engaged in by the Massachusetts Appeals Court that is key to determining whether the review was direct or collateral. Stated otherwise, it is the Petitioner's procedural posture in that court after it directed him to file a Rule 30(b) motion that is the critical factor in determining the nature of the review. Cf., Frasch v. Peguese, *supra*, 414 F.3d at 524.

-6-

In the instant case, after a prolonged period of litigation that began at the Petitioner's sentencing hearing over "jail credits" (see Respondent's Exhibit O), on July 31, 1996, the Massachusetts Appeals Court denied the appeal of a state writ of habeas corpus (a civil action) and directed Petitioner to file "a motion to withdraw his guilty pleas" pursuant to Mass. R.Crim.P. 30(b) to address the Commonwealth's breach of the plea agreement underlying this action (see Respondent's Exhibit Q, pg. 5 n.2).<sup>3</sup> Thereafter, on or about October 16, 2002, Petitioner filed his pro se motion to correct an illegal sentence pursuant to Rule 30(b) in the superior court.<sup>4</sup> (Respondent's Exhibit X).

On October 16, 2002, after the Suffolk Superior Court denied Petitioner's motion to correct an illegal sentence and motion for reconsideration, Petitioner filed his notice of appeal. After granting Petitioner's motion to consolidate, the Suffolk and Middlesex Superior Court actions were docketed in the Massachusetts Appeals Court for appellate review. (RSB at pgs. 14- ) In due course, Petitioner filed his brief and record appendix in the Appeals Court. On August 17, 2004, the Appeals Court denied Petitioner's breach of plea agreement claim on the

---

<sup>3</sup> When the Appeals Court decided Petitioner's appeal on July 31, 1996, the remedy of "specific performance" had not yet been adopted in Massachusetts. See, e.g., Commonwealth v. Parzyck, 41 Mass.App.Ct. 195, 668 N.E.2d 1358, fur. app. rev. den'd, October, 1996, 423 Mass. 1110 (1996).

<sup>4</sup> Petitioner initially filed his motion to correct an illegal sentence in the Suffolk Superior Court under the case number assigned to his probation case. (RSB at pg. 14) A copy of Petitioner's motion was also forwarded to Justice Quinlan at the Middlesex Superior Court. Both courts eventually ruled on the motion, denying same, without holding a hearing. (RSB at pgs. 14-15)

-7-

merits. Commonwealth v. Donnelly, 61 Mass.App.Ct. 1121, 813 N.E.2d 584 (2004). (RSB at pg. 16; and Respondent's Exhibit 3) On September 7, 2004, Petitioner filed his Application to Obtain Further Appellate Review (ALOFAR) in the Massachusetts Supreme Judicial Court (SJC) from the Appeals Court's decision in Donnelly, supra, 813 N.E.2d 584. The SJC denied Petitioner's ALOFAR on October 27, 2004. Commonwealth v. Donnelly, 442 Mass. 1111, 816 N.E.2d 1222 (2004)(table decision). (RSB at pgs. 16-17; Respondent's Exhibit T) Significantly, throughout the entire aforementioned appellate proceedings the state's appellate courts reviewed Petitioner's claim on the merits without the typical res judicata/procedural bar analysis normally employed in a case involving post-conviction review. Cf., Frasch v. Peguese, supra, 414 F.3d at 522; citing Orange v. Calbone, 318 F.3d 1167, 1171 (10th Cir. 2003)(concluding that "direct review" occurred when [] state prisoner was granted belated appeal in which he was required to follow the procedural rules for a direct appeal, and the state appellate court "review[ed] the issue[] raised ... on the merits without the typical res judicata/procedural bar analysis normally employed in a case involving post-conviction review").

Against the foregoing backdrop, once the Petitioner here filed his appeal from the denial of his Rule 30(b) motion addressing the breach of his plea agreement, and the Appeals Court addressed the claim on the merits, the Petitioner was in the same procedural posture as one who timely filed a direct appeal. See

-8-

Dunbrack v. Commonwealth, supra, 498 N.E.2d at 1058; cf., Frasch v. Peguese, supra, 414 F.3d at 523; quoting Orange v. Calbone, supra, 318 F.3d at 1171.

In sum, as in Frasch, when Petitioner filed his Rule 30(b) motion to correct an illegal sentence on October 16, 2002, he initiated direct review. The Massachusetts Appeals Court engaged in direct review when it considered and denied Petitioner's appeal on the merits on August 17, 2004; and the SJC engaged in direct review when it considered and denied Petitioner's ALOFAR on September 7, 2004. The AEDPA's statute of limitations started running ninety days later, on December 6, 2004, when Petitioner's time for seeking further direct review in the United States Supreme Court expired. Thus, his petition for a writ of habeas corpus was not time-barred by the AEDPA's one-year statute of limitations when he filed it by mail and it was received by this court on December 28, 2004.


Accordingly, the Respondent's AEDPA's time limit defense must again fail.

#### CONCLUSION

For the foregoing reasons the Respondent's motion to dismiss must be denied; and this court should issue an order to cause the writ of habeas corpus to issue.

Dated: OCT. 5 2005

Respectfully submitted,

  
 Gregory M. Donnelly, pro/se  
 Middlesex House of Correction  
 269 Treble Cove Road  
 Billerica, MA 01862

-9-

CERTIFICATE OF SERVICE

I, Gregory M. Donnelly, hereby certify that on the date below a true copy of the above document was served on Randall E. Ravitz, Esquire, the Respondent's attorney, by mailing same to his usual place of business, Office of the Attorney General Criminal Bureau, One Ashburton Place, Boston, MA 02108, postage pre-paid.

Dated: OCT. 5, 2005

  
Gregory M. Donnelly  
Affiant